

ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF

FAIRHOPE LLC
THE SHOPPES @ FAIRHOPE VILLAGE
FAIRHOPE, T6S, R2E, S8,
BALDWIN COUNTY, ALABAMA
NPDES ALR16EAE1

)
)
)
) ORDER 09-XXX-CWP
)
)
)
)
)
)

PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter "Department"), and Fairhope, LLC pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 to 22-22A-16 (2006 Rplc. Vol.), the Alabama Water Pollution Control Act (hereinafter "AWPCA"), Ala. Code §§ 22-22-1 to 22-22-14 (2006 Rplc. Vol.) and the regulations promulgated pursuant thereto, and § 402 of the Federal Water Pollution Control Act, 33 U.S.C. § 1342.

STIPULATIONS

1. Fairhope, LLC (hereinafter "Operator"), is a Delaware Limited Liability Corporation which is constructing the commercial development called The Shoppes @ Fairhope Village (hereinafter "Facility") located in T6S, R2E, S8, in Fairhope, Baldwin County, Alabama. Sediment and other pollutants in stormwater runoff from the Facility have the potential to discharge and/or have discharged to Fly Creek, a water of the State, classified for Fish & Wildlife, Swimming, and other Whole Body Water-Contact Sports.

2. The following acronyms are used in this Consent Order and when used shall have the meaning of the name or title referenced below.

| | |
|-------|---|
| BMPs | Best Management Practices |
| CBMPP | Construction Best Management Practices Plan |
| NTUs | Nephelometric Turbidity Units |
| NOR | Notice of Registration |
| NOV | Notice of Violation |
| NPDES | National Pollutant Discharge Elimination System |
| QCP | ADEM-recognized Qualified Credentialed Professional |

3. The Department is a duly constituted department of the State of Alabama pursuant to Ala. Code §§ 22-22A-1 to 22-22A-16 (2006 Rplc. Vol.).

4. Pursuant to ADEM Admin. Code rs. 335-6-12-.05(1) and 335-6-12-.11(1), the Operator is required to submit to the Department an NOR in order to register for and obtain NPDES coverage prior to commencing and/or continuing regulated disturbance activities.

5. On February 29, 2008, the Operator submitted to the Department an NOR requesting NPDES coverage under ADEM Admin. Code chap. 335-6-12, for regulated disturbance activities and discharges of treated stormwater from the Facility. The Department granted registration ALR16EAE1 to the Operator on March 11, 2008. Registration ALR16EAE1 is scheduled to expire on March 10, 2010.

6. Pursuant to ADEM Admin. Code chap. 335-6-12-.05(2), all NPDES construction sites/activities and noncoal mining sites/activities less than five (5) acres in size in Alabama are required to fully implement and regularly maintain effective BMPs to the maximum extent practicable, and in accordance with the Operator's CBMPP that has been prepared by a QCP.

7. Pursuant to ADEM Admin. Code chap. 335-6-12-.05(3) and 335-6-12-.28, the Operator is required to ensure that comprehensive inspections of the Facility, offsite areas and stormwater conveyances, and associated receiving waters are conducted according to a prescribed schedule, after significant precipitation, and as often as needed by a QCP, to ensure that effective BMPs have been properly designed, implemented, and maintained. Each day there is activity at the Facility, the Operator or other qualified person is required to observe that portion of the Facility where construction disturbance has occurred and report any apparent BMP deficiencies to the Operator or QCP.

8. During inspections by the Department of the Facility on August 8, 2008, August 12, 2008, August 13, 2008, December 10, 2008, February 19, 2009, March 30, 2009, and May 4, 2009, the Department documented that the Operator had not properly implemented and maintained effective BMPs resulting in potential discharges of sediment and other pollutants in stormwater runoff leaving the site.

9. Pursuant to ADEM Admin. Code rs. 335-6-12-.26(5) and 335-6-10-.09, discharges from the Facility shall not cause turbidity downstream of the Facility to exceed upstream turbidity by 50 NTUs, nor shall discharges from the Facility cause substantial visible contrast in instream turbidity.

10. Analyses of water samples collected by the Department on May 4, 2009, from Fly Creek which receives stormwater discharges from the Facility, indicated an upstream turbidity of 87 NTUs and a downstream turbidity of 140 NTUs, resulting in an increase of 53 NTUs. The Department noted other sources contributing to the turbidity levels within Fly Creek.

11. During the inspections by the Department on August 12, 2008, August 13, 2008, December 10, 2008, March 30, 2009, and May 4, 2009, the Department observed that stormwater discharges from the Facility were causing substantial visible contrast in instream turbidity in Fly Creek.

12. Pursuant to ADEM Admin. Code r. 335-6-12-.35(10)(a), the Operator is required to determine the nature, amount, and impact of a non-complying discharge, and remove, to the maximum extent practical, sediment and other pollutants deposited offsite.

13. The Department observed during its inspections on August 8, 2008, August 12, 2008, August 13, 2008, December 10, 2008, March 30, 2009, and May 4, 2009, significant offsite accumulations of sediment resulting from discharges at the Facility.

14. On September 26, 2008, a NOV was sent to the Operator by the Department as a result of the August 8, 2008, August 12, 2008, and August 13, 2008, inspections. The September 26, 2008, NOV required the Operator to submit to the Department a report prepared by a QCP showing what actions had been taken to correct the noted deficiencies at the Facility within thirty days of receipt of the NOV. On October 16, 2008, the required report was received; however, it was not clear that all issues were addressed in the QCP's report that the deficiencies noted in the September 26, 2008, NOV had been addressed. On October 23, 2008, a follow-up report was received by the Department.

15. The Operator consents to abide by the terms of the following Consent Order and to pay the civil penalty assessed herein.

16. The Department has agreed to the terms of this Consent Order in an effort to resolve the alleged violations cited herein without the unwarranted expenditure of State resources in further prosecuting the above alleged violations. The Department has determined that the terms contemplated in this Consent Order are in the best interests of the citizens of Alabama.

CONTENTIONS

17. The Operator neither admits nor denies the Department's allegations. The Operator contends that it fully implemented and maintained all required BMPs at the Facility, exhibited a standard of care above that required by statute, regulations or industry standards. The Operator states that it responded immediately to rainfall events or threatened enforcement actions and that no sediment from the Facility entered Fly Creek at any time as a result of the construction activities. The Operator further contends that any temporary failures of one or more of the BMPs, or discharge of turbid water or sediment off-site, were the result of chronic and catastrophic precipitation.

18. The Department neither admits nor denies the Operator's contentions. Pursuant to Ala. Code § 22-22A-5(18)c. (2006 Rplc. Vol.), in determining the amount of any penalty, the Department must give consideration to the seriousness of the violations, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by such person; the economic benefit which delayed compliance may confer upon such person; the nature, extent and degree of success of such person's efforts to minimize or mitigate the effects of such violations upon the environment; such person's history of previous violations; and the ability of such person to pay such penalty. Any civil penalty assessed pursuant to this authority shall not be less than \$100.00 or exceed \$25,000.00 for each violation, provided however, that the total penalty assessed in an order issued by the Department shall not exceed \$250,000.00. Each day such violation continues

shall constitute a separate violation. In arriving at this civil penalty, the Department has considered the following:

A. **SERIOUSNESS OF THE VIOLATIONS:** Sediment was discharged from the Facility by the Operator. The Operator did not ensure that effective BMPs were fully implemented and maintained resulting in the discharge of pollutants that could otherwise have been prevented and/or minimized. There is no evidence that the noted violations caused irreparable harm to the environment. There is no evidence that the noted violations were a threat to the health or safety of the public.

B. **THE STANDARD OF CARE:** The Operator did not implement and fully maintain effective BMPs at the Facility. The Operator did not exhibit a standard of care commensurate with applicable regulatory requirements.

C. **ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED:** The Department has been unable to ascertain if there has been a significant economic benefit conferred on the Operator by the Operator's failure to comply with applicable regulatory requirements and delayed response to the noted violations.

D. **EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATIONS UPON THE ENVIRONMENT:** The Operator took action to minimize or mitigate to the extent practicable the effects of the noted violations upon the environment. There are no known environmental effects as a result of the alleged violations.

E. **HISTORY OF PREVIOUS VIOLATIONS:** The Operator does not have a history of previous violations.

F. **THE ABILITY TO PAY:** The Operator has not alleged an inability to pay the civil penalty.

G. **OTHER FACTORS:** Generally the violations fell into three broad categories of 1) failure to implement and maintain effective BMPs, 2) sediment accumulation/deposition off-site and 3) sediment accumulation/deposition in wetlands adjacent to the site, which have historically received penalty amounts of 1) \$100.00 to \$2,500.00 per day, 2) \$100.00 to \$2,500.00 and 3) \$100.00 to \$2,500.00 per day.

H. It should be noted that this Special Order by Consent is a negotiated settlement and, therefore, the Department has compromised the amount of the penalty the Department believes is warranted in this matter in the spirit of cooperation and the desire to resolve this matter amicably, without incurring the unwarranted expense of litigation.

ORDER

Therefore, the Operator, along with the Department, desires to resolve and settle the compliance issues cited above. The Department has carefully considered the facts available to the Department and has considered the six penalty factors enumerated in Ala. Code § 22-22A-5(18)c. (2006 Rplc. Vol.), as well as the need for timely and effective enforcement, and the Department believes that the following conditions are appropriate to address the violations alleged herein. Therefore, the Department and the Operator agree to enter into this Consent Order with the following terms and conditions:

A. The Operator agrees to pay to the Department a civil penalty in the amount of \$11,000.00 in settlement of the violations alleged herein within forty-five days from the effective date of this Consent Order. Failure to pay the civil penalty within forty-five days from the effective date may result in the Department's filing a civil action in the Circuit Court of Montgomery County to recover the civil penalty.

B. The Operator agrees that all penalties due pursuant to this Consent Order shall be made payable to the Alabama Department of Environmental Management by certified or cashier's check and shall be remitted to:

Office of General Counsel
Alabama Department of Environmental Management
PO Box 301463
Montgomery, Alabama 36130-1463

C. The Operator agrees, immediately upon the effective date of this Consent Order and continuing thereafter, to fully implement and maintain temporary BMPs to prevent/minimize to the maximum extent practicable noncompliant and/or unpermitted discharges of pollutants to waters of the State.

D. The Operator agrees that:

1. All inspections/evaluations shall be performed by a QCP;
2. BMP implementation and maintenance, and other corrective/remediation activities, shall be performed under the direct supervision of a QCP and shall be certified by a QCP;
3. All applications, plans, and information shall be certified by a QCP;
4. All submittals to the Department shall comply with applicable ADEM regulations and shall be signed by the Operator and certified by a QCP; and
5. All applications, plans, reports, and other submittals to the Department shall indicate who prepared the submittal, who conducted and/or supervised the inspection/work including his or her QCP designation, how the inspection/work was conducted, and the results of the inspection/work.

E. The Operator agrees, within five days after the effective date of this Consent Order, to have a comprehensive inspection performed of the Facility, offsite conveyances, and affected State waters.

F. The Operator agrees, within thirty days after the effective date of this Consent Order, to submit to the Department a CBMPP detailing effective BMPs to be implemented to prevent/minimize to the maximum extent practicable sediment and other pollutants in stormwater leaving the Facility, and to ensure full compliance with the requirements of ADEM Admin. Code chap. 335-6-12.

G. The Operator agrees, within thirty days after the effective date of this Consent Order, to submit to the Department a detailed plan for the remediation and/or removal of any sediment and other pollutants from the Facility deposited offsite and in State waters.

H. The Operator agrees, within ninety days after the effective date of this Consent Order, to fully implement and maintain effective BMPs, implement all plans required by this Consent Order, and correct all deficiencies at the Facility, offsite conveyances, and affected State waters, including sediment removal/remediation in a manner acceptable to the Department.

I. The Operator agrees, within one hundred-twenty days after the effective date of this Consent Order, to submit to the Department a certification that effective BMPs have been implemented, all deficiencies have been corrected, and full compliance with the requirements of ADEM Admin. Code chap. 335-6-12 has been achieved at the Facility, offsite conveyances, and affected State waters, including sediment removal/remediation in a manner acceptable to the Department.

J. The Operator agrees that, after the effective date of this Consent Order, it shall pay stipulated penalties for each day it fails to meet any of the milestone dates or to satisfy any of the requirements set forth in or established by paragraphs A, C, D, E, F, G, H, and I contained herein or any other requirement date, except for *Force Majure* acts as hereinafter defined, shall be as follows:

| Period of Noncompliance | Penalty per Day per Violation |
|--|-------------------------------|
| 1 st to 30 th day | \$100.00 |
| 31 st to 60 th day | \$200.00 |
| After 60 days | \$300.00 |

If the Operator fails to meet any milestone or any assigned date for a period of ninety days after any required date described in paragraphs A, C, D, E, F, G, H, and I then the Department reserves the right to file a new action against the Operator.

K. The Department and the Operator (hereinafter collectively “ the Parties”) agree that the cumulative stipulated penalties described in Paragraph J above shall under no circumstances exceed \$12,000.00. Once stipulated penalties of \$12,000.00 are due to the Department and violation(s) continue to occur, then the Department shall be free to issue additional orders or to file suit against the Operator in the Circuit Court of Montgomery County or in another court of competent jurisdiction to enforce compliance of this Consent Order.

L. The Operator agrees to submit payment of stipulated penalties, as described in Paragraph J, to the Department so that they are received by the Department no later than thirty days following the completion of the milestone or requirement. Notification to the Operator by the Department of the assessment of any stipulated penalty is not required.

M. The Parties agree that this Consent Order shall apply to and be binding upon both parties, their directors, officers, and all persons or entities acting under or for them. Each signatory to this Consent Order certifies that he or she is fully authorized by the party he or she represents to enter into the terms and conditions of this Consent Order, to execute the Consent Order on behalf of the party represented, and to legally bind such party.

N. The Parties agree that, subject to the terms of these presents and subject to provisions otherwise provided by statute, this Consent Order is intended to operate as a full resolution of the violations which are cited in this Consent Order.

O. The Operator agrees that the Operator is not relieved from any liability if the Operator fails to comply with any provision of this Consent Order.

P. For purposes of this Consent Order only, the Operator agrees that the Department may properly bring an action to compel compliance with the terms and conditions contained herein in the Circuit Court of Montgomery County. The Operator also agrees that in any action brought by the Department to compel compliance with the terms of this Agreement, the Operator shall be limited to the defenses of *Force Majeure*, compliance with this Agreement and physical impossibility. A *Force Majeure* is defined as any event arising from causes that are not foreseeable and are beyond the reasonable control of the Operator, including the Operator's contractors and consultants, which could not be overcome by due diligence (i.e., causes which could have been overcome or avoided by the exercise of due diligence will not be considered to have been beyond the reasonable control of the Operator) and which delays or prevents performance by a date required by the Consent Order. Events such as unanticipated or increased costs of performance, changed economic circumstances, normal precipitation events, or failure to obtain federal, state, or local permits shall not constitute *Force Majeure*. Any request for a modification of a deadline must be accompanied by the reasons (including documentation) for each extension and the proposed extension time. This information shall be submitted to the Department a minimum of ten working days prior to the original anticipated completion date. If the Department, after review of the extension request, finds the work was delayed because of conditions beyond the control and without the fault of the Operator, the

Department may extend the time as justified by the circumstances. The Department may also grant any other additional time extension as justified by the circumstances, but the Department is not obligated to do so.

Q. The Parties agree that the sole purpose of this Consent Order is to resolve and dispose of all allegations and contentions stated herein concerning the factual circumstances referenced herein. Should additional facts and circumstances be discovered in the future concerning the Facility which would constitute possible violations not addressed in this Consent Order, then such future violations may be addressed in Orders as may be issued by the Director, litigation initiated by the Department, or such other enforcement action as may be appropriate, and the Operator shall not object to such future Orders, litigation or enforcement action based on the issuance of this Consent Order if future orders, litigation or other enforcement action address new matters not raised in this Consent Order.

R. The Parties agree that this Consent Order shall be considered final and effective immediately upon signature of all parties. This Consent Order shall not be appealable, and the Operator does hereby waive any hearing on the terms and conditions of same.

S. The Parties agree that this Consent Order shall not affect the Operator's obligation to comply with any federal, State, or local laws or regulations.

T. The Parties agree that final approval and entry into this Consent Order are subject to the requirements that the Department give notice of proposed penalty Orders to the public, and that the public have at least thirty days within which to comment on the Consent Order.

U. The Parties agree that, should any provision of this Consent Order be declared by a court of competent jurisdiction or the Environmental Management Commission to be inconsistent with federal or State law and therefore unenforceable, the remaining provisions herein shall remain in full force and effect.

V. The Parties agree that any modifications of this Consent Order must be agreed to in writing and signed by both parties.

W. The Parties agree that, except as otherwise set forth herein, this Consent Order is not and shall not be interpreted to be a permit or modification of an existing permit under

federal, State or local law, and shall not be construed to waive or relieve the Operator of the Operator's obligations to comply in the future with any permit coverage.

Executed in duplicate with each part being an original.

FAIRHOPE, LLC, a Delaware
limited liability company
By: REGENCY CENTERS, L.P., a
Delaware limited partnership, its
Managing Member
By: REGENCY CENTERS CORPORATION,
a Florida corporation, its General Partner



Jeffrey R. Pape
Vice President

Date Signed: 7-9-09

ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

Onis "Trey" Glenn, III
Director

Date Signed: _____